FILE COPY

INDEX

Subject Index

TABLE OF CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1063

O. H. FISCHER AND MARTHA FISCHER, HUSBAND AND WIFE,

Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioners, O. H. Fischer and Martha Fischer, husband and wife, most respectfully pray this Honorable Court that the Writ of Certiorari be granted to review the proceedings had and the final decision of the Supreme Court

of the State of Oklahoma, in a certain case pending in said Court, styled and numbered as follows:

No. 32377

O. H. Fischer and Martha Fischer, Husband and Wife, Plaintiffs in Error,

vs.

The City of Oklahoma City, a Municipal Corporation, Defendant in Error

Wherein, your petitioners were Plaintiffs in Error, and your respondent was the Defendant in Error, and respecting such proceedings and final decision, your petitioners respectfully represent and show:

That on the 15th day of March, 1945, your petitioners, residents of Oklahoma County, State of Oklahoma, as plaintiffs commenced an action in the District Court of Oklahoma County, State of Oklahoma, against The City of Oklahoma City, a municipal corporation, and Phillips Petroleum Company, a corporation, as defendants. The case was tried in the lower court under the plaintiffs' first amended petition, which, in substance, stated that the plaintiffs were husband and wife and that they were the owners of the following described property situated in Oklahoma County, State of Oklahoma, to-wit:

> The Northeast Quarter (NE/4) of Section Eight (8), Township Twelve (12) North of Range Four (4) West of the Indian Meridian;

and alleged that the plaintiffs (petitioners) never voluntarily sold the above property to The City of Oklahoma City, and that the property was taken by eminent domain under condemnation by The City of Oklahoma City, a municipal corporation, allegedly for park purposes; and

that on February 13, 1945, The City of Oklahoma City advertised said property for lease for oil and gas development purposes, and that the defendant Phillips Petroleum Company, a corporation, bid the sum of $96,200.00 cash plus a one-eighth (1/8th) royalty for an exclusive lease on the above land.

The petitioners allege that The City of Oklahoma City, a municipal corporation, does not own said property and allege, in substance, that the condemnation of said property for park purposes was a subterfuge and The City of Oklahoma City had never intended to make a park of the land, and The City of Oklahoma City had not, up to the time of the filing of said suit, made any effort toward making a park of the above land; and further alleging that the City had condemned said property solely for the purpose of leasing it, for a nominal consideration, to private individuals, firms, and corporations, as an airport for common carriers, carrying passengers, freight and other merchandise, in violation of the petitioners' rights under Article 2, Section 24, of the Constitution of the State of Oklahoma.

The petitioners, in substance, further allege that if they had known at the time the respondent, The City of Oklahoma City, brought condemnation proceedings that the purpose of said City was to use this land solely for an airport and to sub-lease the same for private purposes and to companies for a nominal fee, they would have under the law been able to prevent the taking of said property and the condemning of the fee simple title or any part of the title.

Paragraph 7 of the amended petition alleges that the said condemnation proceedings constitute the taking of the petitioners' property in violation of the Constitution of the State of Oklahoma, and in violation of their rights under the Constitution of the United States; and the peti-

tioners prayed for a judgment of the Court decreeing not only the mineral rights but all rights of the respondent, The City of Oklahoma City, a municipal corporation, be cancelled.

The City of Oklahoma City answered said amended petition claiming that it had condemned said property and asked for the fee simple title; and that the petitioners were paid the amount of damages as fixed by the jury in Cause No. 102930 of the District Court of Oklahoma County, State of Oklahoma. See Pages 14-16, T. R. The petitioners' reply to the answer of the respondent, denying that the said respondent, The City of Oklahoma City, obtained the fee simple title, denying estoppel, and alleging that if said property was condemned for park purposes, that the proceedings were not brought and had in the form and manner provided by the laws of the State of Oklahoma, and the Charter of the City of Oklahoma City, and the ordinances of The City of Oklahoma City, and that if it was for park purposes, it was "ultra vires."

There was a stipulation signed by the petitioners in said law suit and the respondent, which eliminated the necessity of the defendant, Phillips Petroleum Company, a corporation, from proceeding further in said law suit. This is shown at Pages 20-29, T. R.

The case was tried to the Court on the 18th day of June, 1945, and the trial thereof completed on the 21st day of June, 1945, and the trial court held that The City of Oklahoma City obtained a fee simple title to said property; and denied the petitioners the right to recover anything in said suit. See Pages 208-210, T. R. In due time, the petitioners filed a motion for new trial and presented the same, and it was overruled.

O. H. Fischer and Martha Fischer, your petitioners, perfected an appeal from said orders and judgment to the

Supreme Court of the State of Oklahoma. Wherein, by consideration of that Court, the judgment of said trial court was affirmed against your petitioners on the 24th day of September, 1946; and in due time, and under Rule 33 of the Supreme Court of the State of Oklahoma, the petitioners filed a petition for rehearing and submitted briefs in support thereof, wherein it was alleged that the decision deprived the petitioners of their property without due process of law, under the 14th Amendment to the Constitution of the United States; and that said decision was contrary to the due process clause of the 14th Amendment to the Constitution of the United States. On the 26th day of November, 1946, said petition for rehearing was denied, and an order was issued to the Clerk of the Supreme Court of the State of Oklahoma that a mandate issue forthwith. Rule 33 of the Supreme Court of the State of Oklahoma, reads as follows:

> "33. Mandate and Issuance: (1) After the expiration of fifteen (15) days from the filing of an opinion, the Clerk shall issue and transmit a proper mandate to the trial court; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied, the mandate shall not be issued and transmitted until the expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of."

It will be noted from the above rule that the petitioners had five (5) days from the time of overruling of their petition for rehearing in which to file an application for leave to file a second petition for rehearing. This order of the Court violated the Court's own rule, in directing the man-

date to go down forthwith, and the issuance of said mandate by the Clerk was on the same day, to-wit: November 26, 1946.

The petitioners immediately filed an application to the Court requesting that the mandate be recalled to give them time to file their application for a second petition for rehearing, believing that the first order was in error or an oversight by the Court. This application to recall mandate was denied on the 3rd day of December, 1946. And, thereafter, though the mandate had gone down and had been spread of record, the petitioners filed a request to submit a second petition for rehearing and that was denied on the 19th day of December, 1946.

Upon review of the proceedings of the trial court, the Supreme Court of the State of Oklahoma decided the following in the syllabi herein quoted:

> "Syllabus 1: Eminent Domain * * * It is within the proper province of the Legislature to enact laws which will enable municipalities to acquire fee simple title in real estate by exercising the power of eminent domain.
>
> "Syllabus 2: Municipal Corporations * * * The devotion of a reasonable portion of a public park to airport (aviation field), for recreation and other attendant purposes, comes within the proper legitimate uses for which public parks are created.
>
> "Syllabus 3: Eminent Domain * * * When a city undertakes to take a fee simple title to real estate by eminent domain, the owner may offer legal objections thereto with respect to the need for the taking and the nature of the estate to be taken; but if the owner does not offer these objections and joins issue on the value of the fee simple title sought, he waives these objections and cannot thereafter raise any such issues in an effort to recover the real estate.
>
> "Syllabus: 4: Same * * * The fact that a city leases a part of an airport, acquired by eminent

domain, and facilities to aviation companies and furnishes incidental services to such companies, does not make the city a public service corporation or common carrier within the purview of section 24, art. 2, Constitution of Oklahoma."

Errors

(1) The construction under Syllabus 1, brought in the question under Section 563, Title 2, of the Oklahoma Statutes Annotated, which in part, reads as follows:

> "Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by any person, firm or corporation by virtue of a franchise from said corporation; and every city containing a population of more than two thousand inhabitants shall have the right and power to acquire, own and maintain within or without the corporate limits of such city, real estate for sites and rights of way for public utility and public park purposes, and for the location thereon of waterworks, electric light and gas plants, aviation airports, hospitals, quarantine stations, garbage reduction plants, pipe lines for the transmission and transportation of gas, water and sewerage, and for any plant for the manufacture of any material for public improvement purposes, public buildings, and for all such purposes shall have the power to exercise the right of eminent domain, either within or without the corporate limits of such city. * * *"

The construction that the Court gave on the above statute showing no limitations therein, gave a municipality power to condemn property to be sublet, leased or sold to private enterprise and for private purposes, which is in violation of the 5th Amendment to the Constitution of the United States, and Section 1 of the 14th Amendment to the Constitution of the United States. It also repeals by judicial

decree, Section 23, Article 2, of the Constitution of the State of Oklahoma, which reads as follows:

> "No private property shall be taken or damaged for private uses with or without compensation, unless by the consent of the owner, except for private ways of necessity or for drains or ditches across the lands of others for agriculture, mining, or sanitary purposes, in such manner as may be prescribed by law."

(2) Syllabus 2, above, even if it is supported by the facts, which we deny, violated the contract the City made with the Civil Aeronautics' Administrator of the United States Department of Commerce, as authorized by Public No. 812, 76th Congress, approved on October 9, 1940, and is shown as plaintiffs' Exhibit "4", and was executed on the 16th day of January, 1941. See Pages 154-157, T. R. Said contract provided, in substance, that the City would acquire the petitioners' property and other property for airport purposes and be known as Airport No. 2, that the City would keep it up for airport purposes; and Section 5 of said contract reads as follows:

> "That the City of Oklahoma City agrees to accept full responsibility for the operation of said airport for the use and benefit of the public on reasonable terms and without unjust discrimination, and to grant no exclusive right therein contrary to the provisions of Section 303 of the Civil Aeronautics Act of 1938."

(3) Under Syllabus 3, above, the Court holds, in substance, that a municipality or other person or individual can condemn land under eminent domain for one purpose and then convert it to private enterprise by leasing it and subleting it, and the petitioners would be estopped from denying it in the future though such condemnation is void. This is an error of law because such judgments are void as the court did not have the power to enter the same and

estoppel could not arise. The subterfuge charged in this case was proven beyond doubt as will more fully appear in the brief in support of this petition, and said subterfuge deprived these petitioners of their property in violation of the 5th and 14th Amendments to the Constitution of the United States, which was alleged in our petition and which was submitted in our briefs.

(4) Under Syllabus 4 of the decision of the Supreme Court of the State of Oklahoma, it shows on its face that it violates your petitioners' constitutional rights under the 5th and 14th Amendments to the Constitution of the United States as it admits that the City herein acquired the property to convert and sub-lease for private purposes. We briefed this point extensively in our original brief and in our brief in support of petition for rehearing, calling the court's attention to the admitted facts that they were taking our property under the pretense of park purposes but admitting that they expected to lease and let part of the same to common carriers and private enterprise without your petitioners' consent, which is forbidden under the 5th Amendment to the Constitution of the United States, and is specifically forbidden under Section 23, Article 2, of the Constitution of the State of Oklahoma. Since it was admitted in the trial of the case that it was the intention of the City to lease and let said property to airplanes carrying passengers and freight and to private individuals, it is a simple question of law as to the petitioners' rights. All of which was in direct conflict with the purpose set up in the respondent's petition in its condemnation proceedings. The admissions by the City in the case and the photostatic copies of the air field and the runways thereon, all of which were drawn and made before condemnation proceedings were started, and which were introduced and admitted to be the truth by the City is self-evident that said con-

demnation proceedings and the purpose for which it was alleged to be acquired was subterfuge; and if the real purpose had been set forth by the City in its condemnation proceedings, the petitioners could have prevented the taking of the same by eminent domain.

(5) If the holding of the Court is correct, that it is a park and was taken for park purposes, then the City perpetrated a fraud on the Government when it obtained about $300,000.00 from the Government to build an airport. If it is an airport and was built to lease and let to common carriers as was admitted in the trial, the fee could not be acquired because of Section 24, Article 2, of the Constitution of the State of Oklahoma, which reads in part as follows:

> "The fee of the land taken by common carriers for right-of-way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken."

(6) The Supreme Court of the State of Oklahoma, having adopted a set of rules governing procedure in said Court, such rules have the force and effect of statutory law. Rule 33, *supra,* provides that after the petition for rehearing is denied, the mandate shall not be isued for five (5) days, giving the losing party said time in which to file an application for a permit to file a second petition for rehearing. The Court denied your petitioners said time and directed the mandate to issue forthwith, thereby depriving us of our day in Court which is in violation of the 5th and 14th Amendments to Constitution of the United States.

(7) The respondent forfeited all of its right to said property when it executed an oil, gas and mineral lease to the Phillips Petroleum Company, which gave the Phillips

Petroleum Company the following rights as provided for in said lease:

> "Lessor, in consideration of Ten and no/100 ($10.00) Dollars, in hand paid, of the royalties herein provided, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee, for the purpose of testing by any method or methods for formations or structures, investigating, exploring, prospecting, drilling and mining for any producing oil, gas, and all other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures thereon, to produce, save, take care of, treat, transport and own said products, and housing its employees, and for dredging and maintaining canals, constructing and maintaining roads and bridges, and in general, for all appliances or structures, equipment, servitudes and privileges which may be necessary useful or convenient in connection with any such operations conducted by Lessee thereon * * *."

The rights above given destroy said property for practical purposes for an airport. This was done after the government had spent from $250,000 to $300,000 on said property. Said money was obtained under the Civil Aeronautics Act of 1938, and in violation of Section 303 of the provisions of the contract made with the Civil Aeronautics Board. By this act, the respondent did not only defraud the petitioners, but the United States Government.

In support of this petition, the petitioners submit herewith a brief marked Exhibit "A" and made a part hereof, and a certified copy of the Transcript of the Record from the Clerk of the Supreme Court of the State of Oklahoma, and marked Exhibit "B".

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the Supreme Court of the State of Oklahoma, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

A. E. Pearson,
815 Colcord Building,
Oklahoma City, Oklahoma;
V. E. Stinchcomb,
418 First National Bank Bldg.,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1063

O. H. FISCHER AND MARTHA FISCHER, HUSBAND AND WIFE,

Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PROPOSITION 1

Syllabus 1, of the Opinion of the Supreme Court of the State of Oklahoma, Shows on Its Face That the Respondent Deprived These Petitioners of Their Constitutional Rights under the 5th and 14th Amendments to the Constitution of the United States, and Section 23, of Article 2, of the Constitution of the State of Oklahoma.

The facts in this case, as to the purpose the City really had in mind in condemning this property, are not conflicting. It is true that the respondent, in its condemnation

proceedings, did not reveal the true purpose of what it was condemning for. In the respondent's notice to these petitioners to condemn the land, filed in the District Court of Oklahoma County, State of Oklahoma, Case No. 102930, it uses this language at Page 180, T. R.:

> "• • • The plaintiff in the above entitled cause had located a public park with the privilege of locating thereon an aviation airport upon the described property: • • •"

Then there is described the land belonging to these petitioners and other property; and further on in said notice, the following language is used at Page 181, T. R.:

> "• • • and that having been unable to procure said land from you by private purchase and you having refused to grant to said plaintiff said premises or your interest therein for such public park purposes, that the plaintiff will on Tuesday, February 27, 1941, at the hour of 9:00 a.m., or as soon thereafter as counsel can be heard, apply to the presiding judge of the District Court of Oklahoma County, at Oklahoma City, Oklahoma, for an order appointing 3 disinterested freeholders of the County as commissioners who will be selected by said judge from the regular jury list to inspect said real property and consider the injuries which you, as owners thereof, may sustain by reason of the location of said park and by such appropriation of said lands for a public park with the privileges of locating thereon an aviation airport. At which time you may be present if you so desire."

At Page 183 T. R., appears the order of the Court appointing said commissioners; and after naming said commissioners the Court uses the following language:

> "• • • and they are hereby appointed commissioners to inspect said real property hereinbefore de-

scribed and consider the injury which said defendants as the owners of Tracts 1, 2, 3 and 4, will sustain from such appropriation of their lands, and fix and award the owners of said tracts of land, above described, the fair market value thereof."

This was done on the 27th day of February, 1941, which was after the contract with the government was made. Said contract is shown as your petitioners' Exhibit "4".

Mr. Baker, who was a city official, and had been for years, on examination, testified as follows (Shown at Page 87, T. R.):

Q. "But you are dealing exclusively with aircraft carriers?

A. No sir, we never dealt exclusively with them, and we are not dealing exactly exclusively with them now, except as the circumstances have made it impossible for the oil companies and individuals that fly to light on one of our ports and be served. The Army won't allow them to come into Will Rogers. Previous to that time we had lots of every type of plane out there. Our business was always much bigger with individuals and company-owned planes than it was with the airlines."

Then the City Attorney took this witness, who was friendly to the respondent, for cross-examination, and at Page 93, T. R., the following answer was made to the following question:

Q. "Did you know of any plan to operate this airport on Section 8 in any different manner from what the city operated Will Rogers prior to the time the Army took it over?

A. I have always assumed we would operate it just like we did the other. That is the only way we have ever operated on an airport."

At Page 97-8, T. R., the witness, Baker, after admitting that there had been some income from this particular property, gave the following answer to the following question:

> Q. "What is the amount and nature of the income?
> A. Well, we had lease rental payments that we received from, I believe from the Oklahoma City Air College—I believe my memory is right on the name—that ran this aviation school over close to Yukon, and they used our facilities out there and paid us. I don't remember the figure, but all together it ran from 10 to $11,000.00 in rentals."

The respondent's petition to condemn this property, shown as respondent's Exhibit "5", see T. R. Pages 189-196, makes a part of said petition an emergency resolution, passed by the City Council of Oklahoma City on the 16th day of January, 1941, directing that the petitioners' property, together with other lands, be purchased by the City, but if the City is unable to buy, then to condemn said property.

The respondent in the trial court called as its witness Thomas L. S ·ey. Direct examination appearing at Pages 129-134 T. R. Sorey qualified as an architect and identified drawings of the airport on Section 8, Township 12 North, Range 4 West I.M., of which property the Northeast Quarter (NE/4) belongs to these petitioners. The witness identified respondent's Exhibit "2", which was a photostatic copy of the original drawings of said airport, showing runways, parallels running in every angle of the compass across the entire Section, except an inverted V-shaped tract on the east side of said Section in the Southeast Quarter (SE/4), 1,000 feet from the base to the top and approximately 1,200 feet wide at the base, on which would be built driveways to the depot grounds for automobiles and trucks. No part of said driveways was on the petitioners' property. The witness admitted that there

were no buildings on said property at the time of the trial; nor at the time the respondent executed an oil, gas and mineral lease covering said property, though this trial was held in June, 1945, and the witness drew said plans before the petitioners' property was condemned.

On cross examination of said witness, Thomas L. Sorey, beginning at Page 135, T. R., he gave the following answers to the following questions:

> Q. "Now Mr. Sorey, do you have arrangements on these depot grounds for freight and mail service?
> A. Yes.
> Q. And did you have arrangements on this depot grounds for passengers boarding the planes?
> A. That's right.
> Q. And you designed it for the commercial airplanes carrying both passengers and freight, didn't you?
> A. Yes, designed for those; also for private planes."

Then said witness testified, in substance, that he had provided space for express offices, mail offices, passengers' waiting room, and offices for airplane officials.

Then on Pages 136, T. R., the witness Sorey gives the following answers to the following questions:

> Q. "And Mr. Sorey, the whole plan was mostly to be serviceable to airplanes carrying passengers and freight, isn't that right?
> A. Well, that is.
> Q. That is the main issue?
> A. It is an airport, so the primary object is to take care of • • •
> Q. That's right, that is the primary object?
> A. But it is a private flying as well as commercial."

Said witness further admitted, on cross examination, that the primary purpose in acquiring this property, was the establishment of an airport for the accommodation of com-

mercial airplanes, carrying freight and passengers to and from Oklahoma City.

The admitted facts in this case show two things. First: That the respondent condemned said land for airport purposes, and for nothing else. Second: The respondent admits that it condemned said land for airport purposes to be leased to airplanes carrying passengers and freight; and to private individuals.

This, we think, shows that such an attempt to take the fee to said property by judicial decree, violates the 5th and 14th Amendments to the Constitution of the United States; and Section 24 of Article 2, of the Constitution of the State of Oklahoma, a part of which Section reads as follows:

> "The fee of the land taken by common carriers for right-of-way, without the consent of the owner shall remain in such owner subject only to the use for which it is taken."

It also takes from these petitioners their property, to lease and let for private purposes, in violation of the 5th Amendment to the Constitution of the United States; and in violation of Section 23, of Article 2, of the Constitution of the State of Oklahoma, *supra.*

So, the judgment of the trial court, which was affirmed by the Supreme Court of the State of Oklahoma, is void, and without force and effect.

Freeman, on Judgments, Volume 1, Page 642, Section 322, uses the following language:

> "• • • A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect, no judgment at all, confirming no right and affording no judication. Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the founda-

tion for the assertion of any claim or title. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. No action upon the part of the plaintiff, no action upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any Legislative or other department of the government, can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action. The fact that the void judgment has been affirmed on review in an appellate court or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff by instituting a constant menace to defendant."

Volume 1, of Freeman, on Judgments, at Page 643, Section 324, in part, reads as follows:

"So with respect to the relief granted a judgment is likewise divisible. It may be good in part and bad in part. As to some of the relief it may be wholly worthless and at the same time be free from invalidating faults as to other matters adjudicated. If the void portion of the judgment does not infect the whole with invalidity and may be separated from the remainder and treated as surplusage, the judgment will not be voided in toto, but will be upheld as to that portion which was within the jurisdiction and power of the court to render. * * *"

The same author, in Volume 1, Section 354, uses the following language:

> "• • • Hence, though the court may have acquired the right to act in the cause and been put in position of full jurisdiction to go ahead and dispose of the issue involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which may be rightly exercised under the law of its organization is subject to collateral attack for want or excess of jurisdiction, even though the parties may have acquiesced or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."

The Supreme Court of the United States, in the case of *Bigelow* v. *Forrest*, 76 U. S. 353, 19 L. Ed. 696, at page 700 L. Ed., in dealing with void judgments, uses the following language:

> "It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation in the District Court of the United States is conclusive that the entire right, title, interest and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless, a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the Act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction. And it attempted no such thing. The decree made has not that meaning. It is true, the cause in the District Court was entitled, 'United States against all the right, title, interest and estate of French Forrest in and to all that certain piece, parcel, or lot of land' (describing it); but all this is descriptive, not of quantity of estate, but of the subject of seizure, and that was land. The proceeding was required by the

> Act of Congress to be in rem, and the decree condemned, not the estate of French Forrest, but using its own words, 'the real property mentioned and described in the libel.' The marshal was ordered to sell the said property, the boundaries of which were given in the title to the decree. Had the purchasers looked at that decree (and knowledge of it must be attributed to them), they would have seen that it was a decree of confiscation of the land, and they were bound to know its legal effect. It is, therefore, a mistake to argue that the plaintiff below was permitted to impeach collaterally the decree under which the marshal's sale was made, or that the judgment of the court in this case impeaches it. The argument assumes what cannot be admitted, that the decree of the District Court established a confiscation reaching beyond the life of French Forrest, for whose offense the land was condemned and sold."

Even the Supreme Court of the State of Oklahoma, in the case of *Winona Oil Company* v. *Barnes,* 200 Pac. 981, 87 Okla. 226, held, in the 7th Syllabus, the following:

> "Where the record in the case affirmatively discloses that the court was without power to make the order or decree it assumes to make, such order is void, subject to collateral attack for want of jurisdiction in the court to make the same."

In the case of *United States* v. *Walker,* 109 U. S. 258, 27 L. Ed. 927, the Court uses the following language:

> "Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the power granted to it by the law of its organization, its decree is void."

As it was admitted in the record, by the City Officials and the City Council of Oklahoma City, that the respondent expected to construct an airport, not for the purpose of flying planes itself, but for the purpose of leasing it to common

carriers and private individuals, which beyond a doubt, proved the petitioners' allegation of subterfuge; and that the main purpose of the respondent was to take the property belonging to these petitioners under false pretense and to lease same to private individuals, in violation of petitioners' rights under the 5th and 14th Amendments to the Constitution of the United States. We briefed this question extensively when the case was submitted to the Supreme Court of the State of Oklahoma, but the said State Supreme Court never mentioned it in its opinion.

The Supreme Court of Kansas, in the case of *R. R. Co.* v. *Smith*, 23 Kan. 746, in passing on an injunction suit, brought to enjoin a bond issue voted by the City of Irving, for the purpose of aiding an Irving Manufacturing Company in the purchase of lands, on which to erect buildings and install machinery for manufacturing purposes, uses the following language:

> "It is a private corporation which is sought to be aided. It is a private benefit which is sought to be secured. Obviously, the purpose was a private and not a public use."

In the case of *Lake Koen Navigation, Reservoir & Irrigation Co.* v. *Klein*, 65 Pac. 684, the Supreme Court of Kansas, in passing on the question of whether plaintiff in error, under the laws of Kansas, was seeking eminent domain for public or private purposes, held that under the pleadings and claims set up by the plaintiff for the taking of said land, the purpose therein stated would be considered for public use, and that the plaintiff had a right to proceed under public domain. In its opinion, at Page 688, the court made this observation:

> "We may not assume, in the face of this, that plaintiff in error was intending to do otherwise; that this proceeding was merely a subterfuge. This purpose

was a proper public use for the advancement of which the power of eminent domain could be exercised, and its exercise was not ousted simply because plaintiff in error, under its charter, might, under proper circumstances, engage in other enterprises of a private nature. Should it, after the proceedings had ripened, and it had proceeded to devote the condemned property to a use other than that for which it was condemned—primarily and not incidentally—it could, beyond question, be ousted of a possession which it had obtained by fraud, and which it was using for an unauthorized purpose."

The Supreme Court of the State of Washington, in the case of *State ex rel. Harris, et al.*, v. *Superior Court of Thurston County, et al.*, 85 Pac. 666, in passing on an application for an injunction to prevent a certain power company from condemning a right-of-way across private property held that the condemner, although acting as a public utility company in one portion of its business, was delivering light and power to private institutions from another part, and therefore, could not take property for a double purpose under the eminent domain law. The syllabus of said case reads as follows:

"Under Constitution, Article 1, Section 16, prohibiting the taking of private property for private use, a corporation cannot condemn property to further not only the operation of a municipal light plant and electric car system, but also the business of selling electricity generally."

In the body of the opinion, after citing many authorities, the court uses the following language:

"In the Healy Lumber Company case, in which case we decided that public use, authorizing the exercise of the right of eminent domain, contemplated by the constitution, is not synonymous with public benefit, and a use of private enterprises does not authorize

> the exercise of the right, however much public policy demands it; or whatever the public benefit therefrom may be, but it must be a use by the public, or by some agency that is quasi public."

Further on the court quotes from the case of *Brown* v. *Gerald, et al.* (Maine), 61 Atl. 785, 70 L. R. A. 472, as follows:

> "We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power?"

The Supreme Court of Washington, in the case of *State ex rel. Puget Sound Power & Light Company* v. *Superior Court of Snokomis County, et al.*, 233 Pac. 651, in dealing with a request of the Puget Sound Power & Light Company to condemn certain land for a right-of-way to extend its electric line, held that said right-of-way was being condemned to transmit power to be used for both public and private purposes, and that said company, therefore, could not exercise the right of eminent domain. In the third section of the syllabus, the court uses the following language:

> "If a private use is inseparable from a public one, right of eminent domain cannot be invoked; and when a corporation whose articles disclose both public and private purposes seeks to exercise right, court may look to its application and evidence at hearing to determine its real purpose."

The real purpose of The City of Oklahoma City, in condemning the petitioners' property, could not be ascertained at the time of the proceedings; however, at the trial of this case, time proved its real purpose, to-wit: for airport purposes only, to be used by private individuals for an air-

plane landing field; and for rental of hangars to such private individuals; and rental to private airplanes operating as common carriers for the promotion of private enterprise.

The Supreme Court of Indiana, in the case of *Kessler* v. *Indianapolis*, 158 N. E. 547, 53 L. R. A. 1, held that where Indianapolis was really condemning land, ostensibly for street purposes, its real object, however, being for a right-of-way for the benefit of owners of private property, the right of eminent domain would be denied.

In the case of *Chesapeake Stone Co.* v. *Moreland* (Ky.), 104 S. W. 762, 16 L. R. A. (N. S.) 476, the Supreme Court of Kentucky, in passing on the right of eminent domain where the main purpose was for private benefit, uses the following language at Page 482, of 16 L. R. A. (N. S.):

> "If public use was construed to mean that the public would be benefitted in the sense that the enterprise or improvement for the use of which the property was taken, might contribute to the comfort and convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take property."

The Supreme Court of the State of Massachusetts, in the case of *Salisbury Land and Improvement Company* v. *The Commonwealth of Mass.*, 102 N. E. 619, 46 L. R. A. (N. S.) 1196, in construing a special statute passed by the legislature of Massachusetts, authorizing a commission to condemn land for the inhabitants of the commonwealth, as a public service; and authorizing that a portion of said property might be sold or rented to private enterprise, uses the following language in the first and second paragraphs of the syllabus:

> "The legislature cannot establish a commission with power of eminent domain to acquire and manage for the public an ocean beach resort, equipped with cot-

> tages, hotels, stores and places of amusement, with authority to sell or lease such lands, or rights in lands, as are not needed by the public."

The court, in the body of the opinion rendered in the above case, recognized the right of cities to acquire land by eminent domain, at public expense, for bathing beaches and other general utilities, but holds: that when such power constitutes the right to take property and re-sell or lease it for private enterprise, then it is void, and is contrary to the essential principles of free government. In its opinion in said case, the court quotes from the case of *Madisonville Traction Co.* v. *St. Bernard Minn. Co.*, 109 U. S. 239, 49 L. Ed. 462, which quotation reads as follows:

> "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle • • • grows out of the essential nature of all free government."

The court then states:

> "Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for public use and then diverted to a private use."

The above principle of law fits perfectly into the case at bar. The City of Oklahoma City condemned this land, ostensibly for public park purposes; however, it had but one thing in mind: to use the money and to use the property, so condemned, to promote private enterprise.

Section 23, Article 2, of our State Constitution is almost identical with the Massachusetts constitution. So, much of Section 563, Title II, Compiled Laws of 1941, which confers, or attempts to confer, upon cities the power to condemn land for airport purposes, to be sublet, leased or sold to

private individuals or corporations, to promote private enterprise, is void.

The Supreme Court of Michigan, in the case of *Pere Marquette Railroad Company* v. *The United States Gypsum Company, et al.*, 117 N. W. 733, 22 L. R. A. (N. S.) 181, held that a sidetrack of a railroad cannot be regarded as a public benefit where it reaches and serves a private enterprise; that the railroad could not exercise the right of eminent domain for such purpose.

One of the most striking cases, and probably the one most in keeping with the case at bar, is a case from the Supreme Court of Massachusetts, 91 N. E. 405, 27 L. R. A. (N. S.) 483. This was a case where the Legislature of Massachusetts asked the Supreme Court for an opinion on a question of legislation, proposed to be passed for the benefit of the City of Boston, the actual purpose of the act being to give Boston the authority to condemn land for street purposes, and to condemn additional land which might be leased or sold to private enterprise, in order to encourage wholesale business and foreign trade; and giving the city authority to issue bonds and take title to the property. The Supreme Court cited numerous authorities in reaching its conclusion, including many from the Supreme Court of the United States. The syllabus of the opinion in said case, reads as follows:

> "The Legislature cannot authorize a municipal corporation to secure by power of eminent domain, or use the public funds to pay for, lands abutting on a public street, to be leased to merchants for the promotion of the commercial interests of the municipality."

The court, in its opinion in the above case, uses the following language, at Page 484, of 27 L. R. A.:

> "It is a rule of law, universally recognized in this country, that neither of these things can be done,

> unless the taking or expenditure is for public use. This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land, outside of the thoroughfare, is a public use. It is plain that a use of the property to obtain the possible income or profit that might inure to the city from ownership and control of it would not be a public use. The city cannot be authorized to take the property from a private owner for such purpose; nor can the city tax its inhabitants to obtain money for such use. It would as well tax them to raise the money to carry on any other private business with a hope of gain. Such proceedings are entirely outside the function of a city, or any sub-division of a city."

We think that the above principle of law is so fundamental and necessary for good government that any other position taken by the court would soon lead to the indiscriminate confiscation of private property for private gain. Our state and federal constitutions would be trampled under foot, and individual right and independence in this country would be without foundation.

The above authorities and the last paragraph above were presented in our original brief before the Supreme Court of Oklahoma, but the law therein presented was totally disregarded in said Court's opinion.

We wish to call the Court's attention to additional authorities, on the taking of property for private purposes, as follows:

Where a municipal corporation is empowered to take property within a definitely restricted area, it may take less than the area, but it cannot take more. *Joslin Mfg. Co.* v. *Providence*, 202 U. S. 668, 43 Sup. Ct. 684.

The right of eminent domain cannot be exercised for the purpose of taking private property for private purposes. *West Bridge Co.* v. *Dix,* 6 How. 507.

The taking of private property, not for public use, but to be leased out to private individuals, for the purpose of raising money, is an abuse of the power of eminent domain, and may be redressed by an action at law just as any other trespass by an assumed authority. *Mills* v. *St. Clair County,* 8 How. 569.

The right of eminent domain is one belonging to a sovereignty, for taking private property for its own uses; and not for those of another. *Kahl* v. *United States,* 91 U. S. 367-23: 449.

The inadequacy of use by the general public is established by an unusual test of whether a particular utility has a public purpose. *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Inter-State Power Co.,* 240 U. S. 30, 36 Sup. Ct. 234.

Municipal ordinances, adopted under state authority, constitute state action and are therefore within the prohibition of the 14th Amendment. *Lowell* v. *Griffin,* 303 U. S. 444, 58 Sup. Ct. 666.

Due process of law is essential to a valid judgment; and a judgment is void for want of due process, where the court exceeds its jurisdiction. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 50 Sup. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107, reversing 19 S. W. 2d 746, 323 Mo. 180, certiorari denied 50 Sup. Ct. 152, 280 U. S. 604, 74 L. Ed. 648, revoked 50 Sup. Ct. 152, 280 U. S. 550, 74 L. Ed. 608, and certiorari granted 50 Sup. Ct. 152, 280 U. S. 550, 74 L. Ed. 608, conformed to 42 S. W. 2d 23, 328 Mo. 836—*Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 38 Sup. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215, reversing 169 S. W. 700, 160 Ky. 244.

Proposition II

Syllabus 2, of the Opinion of the Supreme Court of the State of Oklahoma, reads as follows:

(*"The devotion of a reasonable portion of a public park to airport (aviation field) for recreation and other attendant purposes, comes within the proper and legitimate uses for which public parks are created."*)

At Entry No. 184A, T. R., appears a photostatic copy of the airfield and all of Section 8, which is introduced in the records as the respondent's Exhibit "1". This shows that all of the petitioners' property was to be converted to landing and take-off runways for airplanes; and the only part the respondent attempted to prove would be used for a park was an inverted V-shaped portion, 1,000 feet from base to point, and about 1,200 feet wide, most of which was to be taken up by driveways for automobiles and trucks approaching the depot grounds, or with buildings on the east side. This portion of land, the City proposed to beautify for park purposes by planting grass and shrubbery between the driveways. This could not possibly require over five acres out of the 640 acres appropriated for the park, leaving at least 630 to 635 acres for airport purposes, and this leaves all of the petitioners' land for airport purposes. The evidence as to the amount of land which was to be used for park purposes was not disputed. Just what our court meant by the use of the words "reasonable portion" to aviation purposes, when the evidence shows that 99% is used for such purposes, is beyond your petitioners' power of comprehension.

When the respondent filed its petition to condemn this land, under the laws of Oklahoma, petitioners could not object as to whether it was to be used for airport purposes or for park purposes, because under the Constitution

and laws of Oklahoma, the respondent had the power to go into any kind of business. Section 6, of Article 18, of the Constitution of the State of Oklahoma, reads as follows:

> "Every municipal corporation in this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation, by virtue of a franchise from said corporation."

And, Section 563, Title 11, of the 1941 Compiled Laws of Oklahoma, reads as follows:

> "Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or a corporation by virtue of a franchise from said corporation * * *."

The Supreme Court of Oklahoma, prior to the time of the condemnation of this property, held in the case of the *City of Tulsa* v. *Williams*, 100 Okla. 116, 227 Pac. 876, that when a municipal legislative department passes resolutions declaring that a necessity exists to take certain lands by eminent domain, the owner of the land cannot impeach, and cannot go behind such action in the condemnation of his land.

If petitioners had known about the agreements with the government to build an airport, for use of the public generally; and that the City did not recite the truth in its petition, then they, probably, could have put up a defense; but what was in the officials' minds of Oklahoma City could not be revealed or known, until afterwards, when in the trial of this case, they admitted that the property was condemned to lease and let to airplanes, as common carriers, and to private individuals.

The petitioners could have defended themselves against the taking of the fee to said property, for common carrier purposes under Section 24, Article 2, of the Constitution of

Oklahoma; and if the property was taken for the purpose of leasing to private individuals, as was admitted, the petitioners could have defended under Section 23, Article 2, of the Constitution of Oklahoma, and the 5th and 14th Amendments to the Constitution of the United States. The reasons and the law set out under Proposition I, are referred to and made a part of Proposition II.

Let us now look at some of the evidence. There is no conflict therein produced by the petitioners at the trial of this case. Please keep in mind that in this case the petitioners had to go into the unfriendly camp of the respondent and present their oral testimony, and their exhibits. The petitioners called to the witness stand H. E. Bailey, who was City Manager during the time of the condemnation of the petitioners' lands for park purposes, and whose direct testimony apepars at pages 42-49, T. R., and on page 44, T. R., he gave the following answers to the following questions:

> Q. "Mr. Bailey, do you recall what steps you took to acquire this property for park purposes, with the privilege of locating an airport thereon?
>
> A. No, not in detail. I followed the recommendation of the legal department, and the records will show what steps were taken. I don't remember the detailed handling at the time.
>
> Q. At that time, Mr. Bailey, do you know whether or not there was definite and positive plans on behalf of the City, to locate an airport there?
>
> A. That is my opinion that there was, sir, yes, sir.
>
> Q. Do you know whether or not the City had any plans for the purpose of making a park out of it?
>
> A. I don't.
>
> Q. You don't recall?
>
> A. No, sir.
>
> Q. This matter was all under your control at that time?
>
> A. Yes, after I was appointed.

Q. And you left there about three years later?
A. That is correct, sir.
Q. Do you know what the City did, if anything, in regard to building a park out there and maintaining it, during the time you were City Manager?
A. No park, so far as I know, sir.
Q. It was never placed or maintained there?
A. Not that I know of."

After testifying that this airport was to be built according to regulations of the C. A. A., shown at pages 47 and 48, T. R., this same witness gave the following answers to the following questions:

Q. "Now, Mr. Bailey, in your capacity as City Manager, what department of the City was this property placed under?
A. Well, we had an Airport Department, and Mr. Nuckolls was the Airport Manager at that time in charge of the operations at Will Rogers and the activities there were under his supervision also.
Q. Well, did he ever take charge of it?
A. Yes, sir, delivered gasoline out there from time to time with our regular equipment.
Q. For what purpose was the gasoline delivered?
A. For planes that desired gasoline.
Q. Was this property or any part of it ever placed under the control of the Park Board?
A. I don't recall, sir, whether it was or not."

The witness further testified, on direct examination, that there was a bond issue voted for the purpose of developing this airport. On redirect examination, at page 55, T. R., the witness Bailey gave the following answer to the following question:

Q. "Mr. Bailey, looking at this, what arrangements, if any, are there on there for a park other than the ones I designated in front of the administration building?

A. Well, of course, it is usually customary to beautify any improvements and get as much as you can out of the investment for the convenience of the traveling public, and that is what was anticipated and contemplated here, and in the design it was what we thought at the time was the very latest design and ideas of airports. We made some rather exhaustive studies and investigations before these plans were made and were approved by the Mayor and the Council."

This witness further testified, at page 56, T. R., that the runways marked on the respondent's Exhibit "1" were for the use of incoming and departing planes, carrying passengers and freight and loading and unloading, and on recross examination, by the respondent's attorney, this witness made the following answers to the following questions, at page 59, T. R.:

Q. "All right. Now, the improved airport at Bethany, the Oklahoma City Airport No. 2, as planned and approved by the City Council, was really designed after one of the large modern airports in the United States, isn't that true?

A. That is true, sir.

Q. What port was that?

A. Well, we took part of it from the New York Airport, and we considered some from the Kansas City Airport, but the principal airport was the Washington National Airport at Washington.

Q. That was one of the newer airports and one of the larger and more modern?

A. That is true, yes, sir.

Q. Have you seen that port, Mr. Bailey?

A. Yes sir, I have been there many times."

Aircraft operators are common carriers under the law. Section 58, of Volume 6, of American Jurisprudence, reads as follows:

"When Aircraft Operator Is Common Carrier. That aircraft and the industry of carriage by aircraft are

new is no reason why one in fact employing aircraft as common-carrier vehicles should not be classified as a common carrier and charged with liability as such. There can be no doubt, under the general law of common carriers, that those airlines and aircraft owners engaged in the passenger service on regular schedules on definite routes, who solicit the patronage of the traveling public, advertise schedules for routes, times of leaving, and rates of fare, and make the usual stipulation as to baggage, are common carriers by air. A flying service company which, according to its printed advertising, will take anyone anywhere at any time, though not operating regular routes or schedules, and basing its charges not on the number of passengers, but on the operating cost of the plane per miles, has been held to be a common carrier. It is not necessary, in order to make one carrying passengers by aircraft a common carrier of passengers, that the passengers be carried from one point to another; the status and the liability as a common carrier may exist notwithstanding the craft returns regularly, without landing, to the place from which it started. A relation of common carrier and passenger exists notwithstanding the passenger's ticket issued by an airplane carrier of passengers for hire contains a statement that it is not a common carrier, etc., or a stipulation that it is to be held only for its proven negligence."

There is not a statute in the State of Oklahoma expressly giving municipalities the right to take the fee simple title to property. Eminent domain is recognized by the courts as a harsh rule and almost tyrannical, but it is necessary, under certain circumstances, that it be exercised, and for that reason, statutes granting such authority will be strictly construed. In Section 26, of Volume 18, of American Jurisprudence, the annotator uses the following language:

"Construction of Statutes—A grant of power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse

> and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. In other words, statutes conferring the power must be strictly construed. Clear legislative authority must be shown to justify the taking. Authority cannot be implied or inferred from vague or doubtful language. When the matter is doubtful, it must be resolved in favor of the property owner."

Under the oil and gas lease terms, quoted supra, the City had abandoned said property for all practical uses as a park or as an airport. Since this case was tried in the lower court, there has been a producing oil well drilled on petitioners' property; also since the trial of this case, the City has leased what little equipment it had on the above property to private individuals, who have exclusive control and right of operation thereof for private purposes.

ABANDONMENT WILL BE PRESUMED WHERE THE OWNER OF THE EASEMENT DOES, OR PERMITS AN ACT TO BE DONE, WHICH IS INCONSISTENT WITH THE RIGHTS UNDER THE EASEMENT.

Richardson v. *Trowbridge,* 149 Atl. 241;
Mammoth Cave Park Association v. *State Highway Commission,* 88 S. W. 2d 931;
Columbus & Georgia Ry. Co. v. *Dunn,* 185 S. E. 583;
City of Flint v. *Grand Trunk Western R. R. Co.,* 69 Fed. (2d) 604.

TIME IS NOT A NECESSARY ELEMENT IN THE QUESTION OF ABANDONMENT.

Pope v. *Devereux,* 5 Gray. 409.

Section 73, page 751, Volume 28, of Corpus Juris Secundum, contains the following language:

> "The rights of one holding an easement in the land of another are measured by the nature and pur-

pose of the easement. All easements are limited, however, to the very purpose for which they were created; and their enjoyment cannot be extended by implication. While it is well settled that all rights expressly or necessarily incident to the enjoyment of the easement pass with it, this is the absolute limit of what passes."

Since this Court is acquainted with oil fields—the workings of oil fields—and the rights of the lessee under the terms of the lease set out in this record, it can't help but see that said lease goes beyond the purpose for which said property was condemned. The lease doesn't even approach a "necessary incident" for the enjoyment of the easement for airport and park purposes, for which the land was condemned.

The City of Oklahoma City recognized the fact, when it executed the oil and gas lease on April 17, 1945, that such an act constituted abandonment of the property in question for park or airport purposes, under the terms of said lease, heretofore set out. So the City got busy and tried to patch up the matter by entering into a contract with the lessee on June 17, 1945. See petitioners' Exhibit "1", pages 144-149, T. R. Said oil and gas lease is not a "necessary incident" for the enjoyment of said property for airport or park purposes; but is directly in conflict with the use of the property for such purposes. When said oil and gas was executed by the City, giving right of possession to the lessee, abandonment of the property for the purposes for which it was condemned was in effect immediately.

The petitioners offered their Exhibit "5" in the trial court which was Ordinance No. 5270, shown at page 157, T. R., calling for a bond issue to be made for the purpose of building an airport, and the word "park" was never

used. Said bond issue was for the purpose of acquiring the petitioners' property. The resolution reads as follows:

> "An ordinance authorizing the calling and holding of a Special Election in the city of Oklahoma City, Oklahoma County, State of Oklahoma, for the purpose of submitting to the qualified electors of said city the question of the issuance of the bonds of said city in the sum of nine hundred eighty-two thousand and no/100 dollars ($982,000.00). To provide funds for the purpose of purchasing or acquiring real estate for aviation airport purposes and for making airport improvements; and levying and collecting an annual tax in said city for the payment of the interest on and principal of said bonds; and declaring an emergency."

PROPOSITION III

If Said Property Was Taken for Park Purposes, as Claimed by the City in This Law Suit, the City Could Not Possibly Have Acquired the Fee Under the Laws of the State of Oklahoma.

Section 1223, of the 1941 Compiled Laws of Oklahoma, dealing with park boards of cities in the State of Oklahoma, reads as follows:

> "1223. Board May Purchase or Condemn Lands. The park commissioners shall have the power to take, by purchase or condemnation, all necessary lands for the park or parkway purposes, and if the said park commission cannot, for any cause, agree with the owner or owners of any such land the same may be condemned in the name of the board of park commissioners in the manner provided by the laws of the State of Oklahoma for the condemnation of lands for railway purposes, and the laws of the State of Oklahoma relating to the condemnation of lands for railway purposes are hereby made applicable for the condemnation of lands for park purposes by any such city."

Sections 1214, 1215, 1217, 1218, 1219, 1221, 1222, 1224, and 1225, prescribe various duties of the park board, giving such board complete control over all parks, expenditures of money, power to receive gifts for park purposes, or to reject them; to employ men and to levy taxes for the purpose of supporting parks. In other words: any property for park purposes must be acquired by the park board; maintained and operated by the park board; and in the exercise of eminent domain, the park board can take only such title as is provided by the laws of Oklahoma governing the condemnation of property for railway purposes.

By virtue of Section 24, Article 2, of the Constitution of Oklahoma, *supra,* only an easement can be taken for railroad purposes.

Oklahoma City has what is known as a charter form of government, and Article 4, Section 5, of the Charter of Oklahoma City, Oklahoma, reads as follows:

"Park Board

> "There shall be a board of park commissioners, consisting of three members to be appointed by the manager, who shall hold their positions during the pleasure of the manager, and serve without pay, and except as herein otherwise provided and until the Council shall otherwise provide by ordinance the rights, powers, and duties of said board of park commissioners shall be as now declared and defined by the laws of the State of Oklahoma relative to park boards in cities of the first class. The board of park commissioners shall also have charge of the city cemetery and shall take care of and beautify same."

Petitioners, in their reply to the respondent's answer, pleading the judgment of condemnation against these petitioners, set up that if this property was taken for park purposes, as alleged, then the court proceedings were void

on their face; and the court had no jurisdiction to entertain the original suit, as the park board, alone, had the power to condemn this land for park purposes.

WHERE A SPECIAL ACT IS LATER, IT WILL BE REGARDED AS AN EXCEPTION TO, OR A QUALIFICATION OF THE PRIOR GENERAL ONE, AND WHEN THE GENERAL ACT IS LATER, THE SPECIAL STATUTE SHALL BE CONSTRUED AS REMAINING AN EXCEPTION TO ITS TERMS.

The above rule seemed to have been adhered to by the courts of Oklahoma in all of its decisions, except in the case here presented.

See:

Hollis v. *Adams Gin Co.*, 115 Okla. 25, 241 Pac. 744;
Crosbie v. *Partridge*, 85 Okla. 186, 205 Pac. 758.

Pfister v. *Johnson*, 173 Okla. 541, 49 Pac. 2d 174:

> "• • • We must, therefore, determine whether or not the right expressly granted by the earlier special act is dependent upon a strict compliance with the later general act."

We shall refer to a few general rules of construction heretofore invoked, where similar questions were involved:

> "A general act is not to be construed as applying to cases covered by a prior special act on the same subjects."
>
> *Carpenter* v. *Russell, Adm'x.*, 13 Okla. 277, 73 Pac. 930.

> "The Courts in construing a general statute should guard against interpreting its language so as to conflict with or contradict an earlier and special statute, which may stand independently for a distinct and useful purpose."
>
> *Incorporated Town of Valliant* v. *Mills, et al.*, 28 Okla. 811, 116 Pac. 190.

"When it is apparent that a strict interpretation of a particular statute, construed alone, would defeat the intention of the Legislature as shown by other legislative enactments, which relate to the same subject, and which have been enacted in pursuance of, and according to a general purpose in accomplishing a particular result, such construction should not be adopted."

Board of Com'rs of Creek County v. *Alexander, State Treas.*, 58 Okla. 128, 159 Pac. 311.

"Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible to give effect to both. The construction is to be on the entire statute, and where one part is susceptible to two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction which will render all sections of the statute harmonious must be adopted."

Town of Commanche v. *Ferguson, County Treas.*, 67 Okla. 101, 169 Pac. 1075.

In the case of *Crosbie* v. *Partridge*, 85 Okla. 186, 205 Pac. 758, 762, it is said:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute."

In this case, the Court adopted a rule of construction well established by the Supreme Court of the United States. We quote further from the body of the opinion:

"This rule is stated in the case of Hemmer *v.* United States, 204 Fed. 898, 123 C. C. A. 194, as follows:

"Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly

expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule. Frost *v.* Wenie, 157 U. S. 46, 15 Sup. Ct. 532, 39 L.ed. 614; South Carolina ex rel. Wagner *v.* Stoll, 17 Wall. 425, 436, 21 L.ed. 650; Rosencrans *v.* United States, 165 U.S. 257, 262, 17 Sup. Ct. 302, 41 L.ed. 708; Townsend *v.* Little, 109 U.S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Petri *v.* Creelman Imbr. Co., 199 U.S. 487, 499, 26 Sup. Ct. 133, 50 L.ed. 281; Ex Parte United States, 226 U.S. 420, 424, 33 Sup. Ct. 170, 57 L.ed. 281; Gowen *v.* Harley, 56 Fed. 973, 976, 978, 979, 6 C.C.A. 190, 193, 195, 196; Christie-Street Commission Co. *v.* United States, 136 Fed. 326, 332, 333, 69 C.C.A. 464, 470, 471; Board of Com'rs *v.* Aetna Life Ins. Co., 90 Fed. 222, 227, 32 C.C.A. 585, 590; Bear *v.* Chicago, Great Western R. Co., 141 Fed. 25, 27, 72 C.C.A. 513."

"This rule announced in Ency. U.S. Supreme Court Reports, Volume 11, Page 101, is as follows: 'It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute.'

"In the case of Rodgers *v.* United States, 185 U.S. 83, 84, 22 Sup. Ct. 582, 583, 46 L.ed. 816, in the body of the opinion it is stated: 'It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless the provisions of the general are manifestly incon-

sistent with those of the special. Ex Parte Crow Dog, 109 U.S. 556, 570, sub nom; Ex Parte Kangi-shun-cal, 3 Sup. Ct. 396, 405, 27 L.ed. 1030, 1035.' "

See also:

Bank of Picher v. *Morris,* 157 Okla. 122, 11 Pac. 2d 178;

Hays v. *City of Muskogee,* 117 Okla. 158, 245 Pac. 842;

Citizens' State Bank of Vici v. *Getting,* 77 Okla. 48, 187 Pac. 217.

Village of Reeder v. *Hanson (N. D.),* 213 N. W. 492: This was a condemnation proceeding instituted by the village of Reeder to condemn eight tracts of land belonging to one Hanson. The first seven tracts were sought to be taken for street purposes. The eighth tract was sought to be taken for "public grounds." It was admitted that the village of Reeder had availed itself of Section 4064-4071, C. L. 193, which statutory provisions authorized a village to organize as a park district. The court held:

> "If this be true, it necessarily follows that the board of trustees of a village have no power to maintain an action to condemn property for park purposes. Hence, the action must of necessity fail as regards the tract to be condemned for park purposes. The right to maintain such action is vested in the park commissioners."

City of Fargo v. *Geary et al., Park Commissioners,* 33 N. D. 64, 156 N. W. 552: In this case Fargo, acting by its city council, levied special assessment against Island Park within said city for the paving of streets bordening upon said Island Park. The Park Commissioners refused to recognize the assessment and the city sought to mandamus

the Park Commission to make provision for the payment of same. Mandamus was denied, the court holding:

> "The statutes grant sole and exclusive authority to the Park Commission to pave such streets and levy special assessments for resultant benefits."

In the body of the opinion the powers of the Park Commissioners, as set out by the statute, were as follows:

> "To acquire • • • hold, own, possess, and maintain real and personal property in trust for the purpose of parks, boulevards and ways and to exercise all the powers hereinafter designated or which may be hereinafter conferred upon it."

The court said:

> "Certainly the Legislature did not intent to grant such power to regulate and control and yet leave within the jurisdiction of another authority, the city council, or city governing body, concurrent authority to lay out, open, grade, curb, and otherwise improve streets around said parks. On the contrary, the statute explicitly grants such power exclusively to the commission as an included power to otherwise improve any • • • street around said park; and in the first subdivision it is stated that said commission 'shall have sole and exclusive authority to maintain, govern, erect and improve the same' (the park and immediately adjacent property).
>
> "So construed the statute is a harmonious whole. So construed there can be no conflict of authority between the governing board of the city and the powers of the Park Commission; the express and implied powers of the latter superseding and excluding the exercise by the city through its council of any powers, expressly or impliedly granted the Park Commission in trust for the city."

The court further held:

> "Statutes closely similar to ours upon the subjects of parks and park commissions do not seem to be plentiful. Illinois, New York, Michigan, Ohio and probably other states have such. Doubtless our statute is patterned after those of Illinois; that state having most comprehensive legislation on the subject and being closely analogous to ours. Before the adoption of the first legislation by these states creating a park commission Chicago had been governed for years in such respects by a commission the powers of which had been defined as exclusive as against the general governing body of the city. West Chicago Park Commissioners *v.* City of Chicago, 152 Ill. 392, 38 N. E. 697."

From the conclusions thus drawn, the property in question could only be acquired under Title 11, Section 1223, O. S. A., by a proceedings in the name of the Board of Park Commissioners:

> "If the statute providing for condemnation proceedings in particular instances designates the officers or board authorized to institute and conduct the proceedings, the proceedings should be brought in the name of the officer or board designated."
>
> See: 150 So. 342; 87 So. 780. McQuillen, Volume 1, 1099.

Title 11, Section 1223, O. S. A.:

> "* * * such land may be condemned in the name of the Board of Park Commissioners in the manner provided by the laws of the State of Oklahoma for condemnation of lands for railway purposes, and the laws of the State of Oklahoma relating to the condemnation of land for railway purposes are hereby made applicable for the condemnation of lands for park purposes by any such city."

If the Legislature had intended to refer to "railroad statutes" for the purpose of providing a procedure to be

followed by the Board of Park Commissioners, in exercising the right of eminent domain, then it would have had to go no further than the first clause; but by making all the laws relating to condemnation of lands for railway purposes applicable, it put in force each and every statutory provision, whether procedural or substantive. It would include Title 66, Section 57, which provides in part as follows:

> "the provisions of this article with reference to eminent domain shall apply to all corporations having the right to eminent domain;"

and would also include Title 66, Section 56, which provides in part for appeal from the District Court to the Supreme Court and further provides:

> "The fee of land over which a mere easement is taken without the consent of the owner, shall remain in such owner subject only to the use for which it was taken."

It must of necessity include Article 2, Section 24, of the Constitution, which provides in part:

> "The fee of land taken by common carriers for right of way without the consent of the owner shall remain in such owner subject only to the use for which it is taken."

Unless the clause is given this meaning, it is useless, which is contrary to judicial construction of legislative acts.

There is no conflict between Title 11, Section 1223, O. S. A., and Title 11, Section 563, O. S. A.

Section 1223 adopts the "Railroad Statute," which limits the taking to an easement.

Section 563 provides in part:

> "Any city shall have the power to acquire, own and maintain * * * real estate for sites and rights

of way for public utility and public park purposes, * * * and to establish, lay and operate any such plant or pipe line upon any land or right of way taken thereunder."

By this statute cities with certain qualifications can do two things, to-wit: acquire, own, and maintain real estate and rights-of-way, one is the land itself, the other an interest in land. The city may take the land for sites * * * the rights-of-way for public utility and public parks.

The legislative intent could have been expressed no clearer. To own a right-of-way is to own an interest in land.

A park has been defined as:

> "A piece of ground set apart to be used by the public as a place of rest, recreation, exercise, pleasure, amusement, and enjoyment."
>
> 104 N. E. 342, 71 Anno. St. 1027, 20 L. R. A. (N. S.) 976.

There is no conceivable reason why a tract of land acquired for park purposes should carry any greater title than lands acquired by railroads for roadbeds, depots, switch yards or parking areas.

Establishment and maintenance of public parks requires no more than a use of the surface. Barter or sale of the land is not contemplated. Mining or excavating for oil, gas, or other minerals would be inconsistent with the use of the land for park purposes, and would amount to abandonment of the land for park purposes.

Public parks are more or less transitory in character, often giving way to abandonment because of lack of public use, or the encroachment of commercial structures, or disuse because of lack of care or maintenance, and this would especially be true of the lands in question, as these lands consisted of 640 acres, agricultural land in a high state

of cultivation, having not one single feature which would be either desirable or adaptable for a public park. This land was miles and miles beyond the corporate limits of Oklahoma City; in fact, it was beyond Putnam City and beyond the City of Bethany, with no public transportation facilities, no trees, no grass; nothing but a bare open waste of land after The City of Oklahoma City compelled the owners to cease using it for agricultural purposes.

It cannot be properly contended that this land could be adapted to a public park and airport, for the reason that it was not taken for an airport. It is true, that in the condemnation proceedings, the taking was to acquire, maintain and beautify for a public park, with the *privilege* of locating an airport thereon.

By the use of the word "privilege," it was optional with The City of Oklahoma City as to whether or not it would put an airport on said land. If it didn't, the landowners could not complain.

Privilege Defined:

"A legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act."

Restatement, Property, Section 2.

"In construing a charter where the title to the soil of the shore of a river was in dispute, the court said: 'The term "hereditament," therefore, as well as the words "commodities," "privileges," and "franchises," was never intended to convey the soil, but something appurtenant thereto; for the thing conveyed by this term is that which was belonging to or in any way appertaining to the land granted inhabitants of the town.' "

East Haven v. *Hemingway,* 7 Conn. 186, 200.

"As between the grantor retaining the bed of a stream and the grantee of the ripa, with restrictions

or limitations by contract as to boundaries or other express limitations of the natural riparian rights, the rights conveyed may perhaps be strictly called 'easements' or 'privileges' and not riparian rights."

Paterson v. *East Jersey Water Company,* 74 N. J. Eq. 49, 70 Atl. 472, 480.

"An agreement and subsequent deed, conveying to grantees, their heirs and assigns a small tract with salt wells, buildings, etc., with 'privilege' of mining and taking coal from the land of the grantor, 'as long as they may think proper,' did not amount to a sale of the coal in place, but the grant of a privilege which ended when grantee finally closed his salt works, since the word 'privilege' standing alone imported permissive use."

Saltsburg Colliery Co. v. *Trucks Coal Mining Co.,* 278 Pa. 447, 123 Atl. 409.

Redelegation or Transfer of Power
20 C. J. 545, Section 33:

"When the legislature delegates the right to exercise the power of eminent domain, the grantee of the power cannot surrender, transfer, or redelegate the same to another."

See:

California: *Mahoney* v. *Spring Valley Water Works Co.,* 52 Cal. 159;

Illinois: *Ligara* v. *Chicago,* 139 Ill. 46, 28 N. E. 934, 52 Am. St. Rep. 179; *Olney* v. *Wharf,* 115 Ill. 519, 5 N. E. 366; 56 Am. St. Rep. 178;

Indiana: *Swinnery* v. *Ft. Wayne, etc., R. Co.,* 59 Ind. 205;

Kentucky: *Cornwall* v. *Louisville, etc., R. Co.,* 87 Ky. 72, 7 S. W. 553, 9 Ky. L. 924; *Louisville City R. Co.* v. *Louisville,* 8 Bush 415;

Massachusetts: *Harris* v. *Marblehead,* 10 Gray, 40;

New York: *Ontario Knitting Co.* v. *State,* 205 N. Y. 409, 98 N. E. 909 (aff. 147 App. Div. 316, 131 N. Y. Supp.

918) (aff. 59 Misc. 145, 125 N. Y. Supp. 57); *St. Peter* v. *Denison*, 59 N. Y. 416, 17 Am. St. Rep. 258; *Lyon* v. *Jerome*, 26 Wend. 485, 37 Am. D. 271;

Pennsylvania: *Williamsport, etc. R. Co.* v. *Philadelphia, etc., R. Co.*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; *Jones* v. *Pittsburgh, etc., R. Co.*, 11 Pa. Sup. 202; *Delabole Slate Co.* v. *Bangor, etc., R. Co.*, 6 North Co. 337;

Texas: *Watkins* v. *Hopkins County* (Civ. A.) 72 S. W. 872;

Washington: *Spokane* v. *Spokane, etc. R. Co.*, 75 Wash. 651, 135 Pac. 636; *North Coast R. Co.* v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97;

West Virginia: *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. St. Rep. 527;

England: *Ayr Harbour* v. *Oswald*, 8 App. Cas. 623, 22 E. R. C. 167.

(a) *Rule Applied:* "An ordinance requiring certain railroads to institute the necessary legal proceedings to bring about the elimination of a grade crossing and to bear the cost in such proportion as they or the courts may determine is invalid as an attempt to delegate the power of eminent domain, and because it throws on the courts the nonjudicial power of apportioning the cost."

Spokane v. *Spokane, etc., R. Co.*, 75 Wash. 651, 135 Pac. 636.

(b) "If a statute requires the exercise of discretion on the part of an officer authorized to exercise the power of eminent domain, his powers are judicial, and cannot be delegated."

Ontario Knitting Co. v. *State*, 131 N. Y. Supp. 918, (aff. 58 Misc. 145, 125 N. Y. Supp. 57).

(c) "Where a corporation is a grantee, the power must be exercised by the corporation itself, and not by the president alone without corporate action."

Schaadt v. *Ironton R. Co.*, 22 Pa. Co. 101.

(d) "It will not be presumed that a railroad intended to barter away such right and disable itself wholly or in part to perform its public functions, at least in the absence of clear words, showing such intention."

Jones v. *Pittsburgh, etc. R. Co.*, 11 Pa. Sup. 202.

(e) "A municipality cannot surrender, abridge, or barter away its right of eminent domain relative to the establishment and maintenance of public roads."

Watkins v. *Hopkins County* (Tex. Civ. A.), 72 S. W. 872.

To the same effect: *Matter of First Street*, 55 Mich. 42.

But it is within the power of the Legislature to designate anyone to take the initiative. And the statutory provisions, with respect to the party, in whose name the proceedings are to be instituted, must be complied with.

See *McCarty* v. *Southern Pacific R. Co.*, 148 Cal. 211-217, 82 Pac. 615.

Stanford v. *Worn*, 27 Cal. 171:

"This is an action to condemn certain lands for State Prison purposes, under an act authorizing the Attorney General 'in the name of the people of the State of California' to bring condemnation proceedings for all such lands as the State Prison Directors may deem necessary for the convenience of the prison and the use of the state."

The petition in condemnation was filed in the names of Leland Stanford, Governor; John F. Chellis, Lieutenant Governor; William H. Weeks, Secretary of State, and *ex officio* members of the Board of State Prison Directors of the State of California, instead of the people of the State of California, as directed by the act in question.

The court said:

"In order to render a proceedings of this character effectual for any purpose the provisions of the statute by which they are authorized must be strictly followed,

the power must be exercised precisely as directed and there can be no departure from the mode prescribed without violating the entire proceedings."

(Sedgewick on Statutes, 219.)

In *Bensley* v. *Mountain Lake Water Company,* 113 Cal. 306, the court said:

"All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, express or implied, but against his will and by mandate of law must show for his warrant a strict compliance with those statutory rules from which his title accrues."

(See *Curran* v. *Shattuck,* 24 Cal. 427.)

"The institution of this action in the names of the Board of State Prison Directors is wholly unauthorized by the act in question. The act directs it to be brought in the name of the people of the State of California. This alone is sufficient to render the whole proceedings a nullity."

20 C. J. 887, Section 314:

"The legislature has the power to prescribe the person or persons or corporations who may institute condemnation proceedings provided the constitutional restrictions are observed and to prescribe the conditions and circumstances under which such proceedings may be instituted and it follows that such proceedings can be instituted by those persons and corporations and those only upon whom the requisite authority has been conferred by the legislature."

See:

United States: *Mercantile Trust, etc. Co.* v. *Collins Park, etc. R. Co.,* 101 Fed. 347;

California: *Ventura County* v. *Thompson,* 51 Cal. 577;

Illinois: *Russell* v. *Chicago, etc. R. Co.*, 98 Ill. A. 347;
Massachusetts: *Manning* v. *Bruce*, 186 Mass. 282, 71 N. E. 537; *Chase* v. *Worcester*, 108 Mass. 60;
Mississippi: *Cumberland Telephone, etc.* v. *Morgan*, 92 Miss. 478, 45 So. 429;
Missouri: *Columbia School Dist.* v. *Jones*, 229 Mo. 510, 129 S. W. 705;
New Jersey: *Swift* v. *Delaware, etc. R. Co.*, 66 N. J. Eq. 34, 57 Atl. 546 (aff. 66 N. J. Eq. 452, 58 Atl. 939);
New York: *Long Island R. Co.* v. *Jones*, 151 App. Div. 407, 135 N. Y. Supp. 954; *Matter of N. Y.*, 74 App. Div. 343, 77 N. Y. Supp. 566 (app. dism. 172 N. Y. 653 mem., 65 N. E. 1119 mem.); *Matter of Thompson*, 86 Hun. 405, 33 N. Y. Supp. 467 (aff. 147 N. Y. 701, 42 N. E. 726);
Texas: *Stewart* v. *El Paso County*, 62 Tex. Civ. A. 144, 130 S. W. 590;
Washington: *Prescott Irr. Co.* v. *Flathers*, 20 Wash. 454, 55 Pac. 635.

"Where a municipal commission, a recognized public body, has been specially authorized to institute condemnation proceedings, the question whether it has a legal existence apart from its authority is immaterial."

Matter of Central Park, 16 Aff. Pr. N. Y. 56.

"The power delegated to the officers of a municipality to condemn land cannot be destroyed by the acts of the municipality or by an agreement between the municipality and an individual."

Brimm v. *Boston*, 102 Mass. 19.

43 C. J. 869, Section 1564:

"A city cannot by an ordinance take away from the Board of Park Commissioners any powers, expressly vested in the Board by the Charter."

O'Melveny v. *Griffith*, 178 Cal. 1, 171 Pac. 934:

"When the charter vests in the Board of Park Commissioners management and control of the park system

and the erection and maintenance of buildings thereon and authorized them to accept gifts for parks on behalf of the city an ordinance accepting a gift to erect in a certain park two structures, and appoint in accordance with the terms of the gift, three citizens to supervise the erection and to manage and control the structures after their completion, is void, although the city is authorized by the charter to receive gifts and do all things necessary to carry out their purposes."

Also holds:

"* * * that Board of Park Commissioners has capacity to sue the three citizens."

"A Board of Park Commissioners which by reason of powers conferred upon it, constitutes a corporation or quasi corporation, has the power to sue."

Park Commissioners v. *Nashville,* 134 Tenn. 612, 185 S. W. 694.

Walton, Mayor v. *Donnelly, Commissioner of Finance and Accounting et al.,* 83 Okla. 233, 201 Pac. 367:

"The Mayor of Oklahoma City, who is made the chief executive thereof and whose duty it is by virtue of the charter and the statute of the State to see that all the laws of the State and ordinances of the City are observed within the city limits, must necessarily possess control and supervision over the police department and city jail."

Also held:

"A motion adopted by four votes of the commissioners of said city, whereby they take from the mayor all control over the police department and city jail and attempt to assign said duties to the control of some other office or department is void; and held further, injunction will lie on behalf of the mayor against the commission or commissioners from exercising control over the police by virtue of said void proceeding."

In re Langford, 72 Okla. 40, 178 Pac. 673:

> "Municipal corporations can only exercise such powers of legislation as are given them by the law-making power of the State."
>
> "The State's grants of legislative power to municipalities are strictly construed against a municipality and any fairly reasonable doubt as to grant of the powers will be resolved against the municipality."

Blumenaur et al. v. *Kaw City,* 182 Okla. 409, 77 Pac. 2d 1143:

> "A city council is without authority, by resolution, to delegate its authority and powers to the mayor or other member of the council, giving authority to incur financial obligations upon the city by contract not approved or ratified by the city council."

Title 11, Section 563, O. S. A., is a general statute. It provides no procedure for the exercise of the power of eminent domain. It provides no payment of compensation, either directly or by implication.

If a conflict exists between Section 563, *supra,* and Section 1223, Title 11, O. S. A. (a particular statute dealing only with parks), Section 1223 must prevail.

Section 1223 is a complete act, expressly and by reference; and if it should be decided than the power granted by that statute was validly executed, then The City of Oklahoma City could, and did, acquire only an easement. If the power was not validly executed, then The City of Oklahoma City acquired nothing, either at law or in equity.

Though all of the above authorities were submitted in our original brief in support of our petition for rehearing, the only expression that the Court gave on the same is the following:

> "It is argued that Oklahoma City has no power to acquire property for park purposes but such power

> rests in the park board of said city. Whether this is true or not is of no concern to the Fischers. They have been paid for this land by Oklahoma City and if the title should rest in the park board, one of its agents, instead of the city itself, those corporate entities and the citizens of a municipality only can raise the issue."

The Court by said expression judicially deprived these petitioners of their property rights under the 5th and 14th Amendments to the Constitution of the United States, and without due process of law. It is necessary, as the petitioners insisted it was, for the Court to determine whether or not the property was taken for park purposes, that it was mandatory that the property be condemned by the park board; and if the park board was the proper and necessary party to bring the action under our law, *supra*, the fee simple title could not be taken. And if the property was condemned by the City for airport purposes only, for landing fields, for the use of common carriers, even then, the fee could not be taken. However, our learned State Supreme Court did not see fit to pass on this, but dodged the issue, on the theory that it was none of the petitioners' business, as they had received their money for the land.

It is a rule of law, so far as values are concerned, in eminent domain proceedings, if a perpetual easement is requested, the owner is entitled to the same value as though the fee passed. Thompson, on Real Property, Section 2590, uses the following language:

> "In condemning an easement not limited to a term of years, the rule is to award to the owner the value of the entire fee at the time of the taking." Citing *Cumbaa* v. *Geneva*, 235 Ala. 423, 179 So. 227.

See *Haywood* v. *Mayor, Brooklyn Park Commission* v. *Armstrong*, 45 N. Y. 234, 6 Am. Rep. 7.

The respondent made no contention that said property had not been abandoned for the purposes for which it was condemned.

The petitioners' rights are protected under Section 1, of the 14th Amendment to the Constitution of the United States, as much against court decisions as against legislative acts. See *Commissioners of Sinking Fund of the City of Philadelphia* v. *The City of Philadelphia*, 188 Atl. 314, 342 Pa. 129, 182 Atl. 645, 320 Pa. 394.

PROPOSITION IV

The construction of the Supreme Court of Oklahoma on common carriers under Section 6, Article 18, of the Constitution of Oklahoma, and Section 24, of Article 2, of the Constitution of Oklahoma, shows on its face that the conclusions therein reached are erroneous and deprive these petitioners of their property without due process of law.

In our trial in the lower court and in our brief in the Supreme Court of Oklahoma, we contended that under Section 6, of Article 18, of the Constitution of Oklahoma, and the statutes of Oklahoma, in pursuance thereof, the respondent had all of the rights to go into any kind of business that any other person or corporation might have, either private or public, and that if it condemned land for airport purposes to build runways, to carry freight and passengers, as a common carrier, that it was limited in the nature of the title it took, under Section 24, of Article 2, of the Constitution of Oklahoma. In passing on this question, the learned Judge uses the following language:

> "It is also argued by Fischers that the taking of the property by City for airport purposes makes City a public service corporation or public utility or transportation company within the meaning of section 6,

art. 18, Constitution of Oklahoma, and its corollary sections and aiding statutes; and, by reason of this, the title which the City, as such public utility exercising the power of eminent domain, can take is limited similar to a railroad right-of-way, section 24, art. 2, Constitution of Oklahoma, Section 24, supra, reads in part as follows:

> 'The fee of land taken by common carriers for right-of-way, without the consent of the owner, shall remain in such owner subject only to the use for which it was taken.'

"Fischers offers no convincing analogy between a railroad right of way and an airport. To us, the airport presents a close analogy to a railroad station and surrounding yards and facilities. It is proper to observe that there is no constitutional limitation on the title to be acquired by a railroad for its purposes other than right of way. In addition, the weight of authority, including our opinion in Travis *v.* Dickey, 96 Okla. 256, 222 P. 527, is that the furnishing of services and facilities to further a transportation of goods and passengers without actually transporting the goods and passengers and making a charge for such transporting does not make the furnisher of such services a public carrier. 9 Am. Jur. 446, and 13 C. J. S. 25, et seq., and cases cited in footnotes."

The only case cited in reaching the above conclusion was the case of *Travis* v. *Dickey*, 96 Okla. 256, 222 Pac. 527, and it does not support directly or indirectly the conclusions therein reached. The question arose in this case, and came about, over whether or not tank cars in question should be assessed under special State law for common carriers or be assessed by the local authorities like any other general or personal property. The court held that the tank cars in question were not used as common carriers, but were only leased to private institutions to be used to haul personal property of said institution and not for the

public generally, and the learned Justice Harrison in this same case uses the following language:

> "If a tank car company, whether domestic or foreign, should engage in the business of furnishing tank cars to the public for transporting petroleum products, that is, where such car company, whether domestic or foreign, holds itself out to the public, to any one who may choose to use its cars in transporting petroleum products, they would properly come within the section relied upon, and the 4 per cent therein provided would then be in lieu of all other taxes for which said property could be held liable, it would then come within the term 'public service corporation,' and within the term 'transportation company,' and within the term 'common carrier,' as defined by law, but the cars in question come within neither definition but are the private personal property of an individual, plaintiff in error, whose domicile is in Tulsa County, Okla. The cars themselves are leased to a corporation, which under the contract of lease is bound to use them for its own private use and are in no sense used within the meaning of 'common carrier,' 'public service corporation,' or 'transportation company,' as defined by law, and are therefore not properly taxable under the section upon which plaintiff in error relies."

The above principle of law fits completely into the admitted facts of this case; that respondent admitted it was holding this property, to lease and to let for freight and common carrier purposes, and to private individuals, without discrimination, as that was its contract with the government.

When respondent elected to go into the airplane business, by condemning property for airport purposes, for passenger and freight purposes and other purposes, by that act alone, it became a common carrier, and all of its condemnation proceedings were for an airport. Under the Constitution and laws of Oklahoma, it could put its own air-

planes into operation; and the fact that it chose to lease the land out, and not to operate its own planes, does not give them the right to take the fee, under the Constitution of Oklahoma.

In the majority opinion by the Supreme Court of Oklahoma, wherein the following language is used, the Court certainly did not know what a right-of-way meant under the Constitution:

> "It is proper to observe that there is no conditional limitation on the title to be acquired by a railroad for its purposes other than right-of-way."

This statement would imply that switch tracks, turnouts, freight yards, etc., are not covered by the constitutional provisions as to right-of-way. The opinion cited no authority for the above statement, but we believe the term "right-of-way" under the Constitution covers a great deal more.

The Supreme Court of the State of Illinois in the case of *Chicago & Alton Ry. Co.* v. *People*, 98 Ill. 350, in defining the words "right-of-way," pertaining to railroads, uses the following language:

> "What Is a Railroad Track Within the Meaning of the Revenue Law?
>
> "Land held and in actual use by a railroad company for side tracks, switches and turnouts, must be regarded within the meaning of the revenue law as a part of the right-of-way of the company notwithstanding it may have machine shops, depots, round houses, and other superstructures thereon necessary for the successful use of the land."

The above court, in its opinion defining the statute referring to right-of-way, uses the following language:

> "What was intended that the enactment of this section of the statute by the use of the words hereby

employed, 'such right-of-way'? Were these words intended to mean merely the strip of land a certain number of feet wide upon which the railroad company had constructed its main track or did the framers of the section intend to embrace not only the main line of the road but all side tracks, turnouts, switches, which are connected with the main track and which are in actual use by the railroad company as a common carrier? We can see no reason why the term, 'right-of-way,' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turnout, is built and in actual use by the company in business, for which it was organized for the particular purpose, is as much held for the right-of-way as the lands upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other and hence, the necessity of turnouts, switches and side tracks. In the loading of cars, transfer of cars, the making of trains, and in innumerable other instances that might be named, in prosecution of its business as a common carrier, side tracks, switches and turnouts are each as indispensable to the proper transaction of its business as the main track itself."

The Supreme Court of Indiana in the case of *Pfaff, Auditor, et al.* v. *Terre Haute I. R. Co.*, 9 N. E. 93, in defining the term "right-of-way" under the statutes, uses the following language:

"The term, 'right-of-way,' is not limited by any statutory definition, nor any statutory provision, to a strip of land of any particular or definite width at all points on the line of the railroad. As applied to a railroad company it means a way over which the company has the right to pass in the operation of its trains. Citing Williams *v.* Railroad Co., 50 Wis. 76, a railroad cannot be operated with anything like success with a single track. It is necessary to have either a double track, turnouts and side tracks in order that trains

> going in opposite directions may pass. It is just as necessary that there shall be turnouts and side tracks for the making up of trains, the changing of engines, the replenishing of them with water and fuel, and the loading and unloading of freights."

The Supreme Court of the United States, in the case of *St. Louis, Kansas City & Colorado Railroad Company* v. *Wabash Railroad Co., et al.*, 217 U. S. 246, 54 L. Ed. 752, construing a contract, pertaining to the right-of-way granted through Forest Park in St. Louis, which grant provided that the railroad obtaining said right-of-way should permit other railroads to use the same, upon fair compensation. The grantee under said right-of-way and its successors and assigns claimed that the word "right-of-way" had reference only to the main line road bed, and that the switches, terminal facilities, etc., were not included therein. The Supreme Court, speaking through Chief Justice Fuller, at 756 Law Ed., quoted with approval from the opinion of the Circuit Court rendered by Judge Sanborn, as follows:

> "The ordinary significance of the term 'right-of-way' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or track it owns or is entitled to use for this purpose and not any specific or limited part thereof upon which its main track or other specified improvements are located."

At this point the court cited several authorities, including *Pfaff* v. *Terre Haute I. R. Co., supra*, and *Chicago & Alton Ry. Co.* v. *People, supra.*

The Supreme Court of the United States, in the case of *Territory of New Mexico* v. *United States Trust Co., et al.*, 172 U. S. 170, 43 L. Ed. 407, had occasion to pass on the meaning of the term "right-of-way," under the law. This case was construing a certain Act of Congress giving the

railroads right-of-way across public domain of the United States. Section 2, of said Act reads as follows:

> "And be it further enacted, that the right-of-way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States."

The question involved in said case submitted to the court on agreed statement of the facts, and the question of law submitted, was the interpretation of these words: "and the right-of-way shall be exempt from taxation within the territories of the United States." The State of New Mexico claimed the right, under said Act, to tax the depot grounds, switch yards, roundtables, etc., and the words "right-of-way" only exempted the main line track. The Court held that the words "right-of-way" meant all tracks, stations, and other things necessary for the operation of the railroad; and quoted with approval the case of *Joy, et al.* v. *City of St. Louis,* 138 U. S. 1, 34 L. Ed. 843, wherein Justice Blatchford uses this language:

> "The track cannot be separated from the right-of-way, the right-of-way being the principal thing and the tracks merely an incident. A right-of-way is of no particular use to a railroad without the superstructure

and rails; the track is a necessary incident to the enjoyment of the right-of-way."

The case just quoted from was the first case construing the meaning of the words "right-of-way," across Forest Park in St. Louis, Mo.

A large number of the framers of our State Constitution were able lawyers, such as the Honorable W. A. Ledbetter and Judge R. L. Williams and many others, so it is assumed that they knew what they were talking about, and that they knew what the law meant when they wrote the following clause in Article 2, Section 24, of the State Constitution:

> "The fee of land taken by common carriers for right-of-way without the consent of the owner, shall remain in such owner subject to the use for which it is taken."

In our humble judgment, the majority opinion in this case implied that railroads, side tracks, switch lines, etc., could be condemned in fee and would not violate the above clause of the Constitution, which is erroneous and amounts to repealing that clause of the Constitution by judicial decree.

Section 51, Title 66, 1941 Statutes Annotated, reads as follows:

> "Power to Enter Upon and Appropriate Lands.
>
> "Every railroad incorporated under this Article, and any railroad corporation authorized to construct, operate, or maintain a railroad within the State has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine shops, switches, side tracks, turntables, snow defenses and water stations; all material for the

construction of such road and its appurtenances, and the right-of-way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by law."

There is no discrepancy in the power given in the above section to right-of-way and other uses which are necessary for railroad purposes, switches, side tracks, turntables, water stations, etc., nothing is indicated that the fee should be taken and we take the position that if said section should have provided for a fee, it would have been unconstitutional for that reason.

PROPOSITION V

The rules of the Supreme Court of Oklahoma under the statutes of Oklahoma have the same force and effect as statutes and in this case, the Supreme Court of Oklahoma violated its own rules to the prejudice of the petitioners.

In this connection, we offer the statutes and rules and the orders of the Supreme Court in this case. Section 74, Title 12, of the 1941 Compiled Laws of the State of Oklahoma, reads as follows:

"Supreme Court Rules.—The justices of the Supreme Court shall meet every two years during the month of June at the capital of the State and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code, and shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the Supreme Court, the district courts, the superior courts, the county courts and all other courts of record."

In pursuance of said authority given by statute, the Supreme Court of Oklahoma adopted Rule 33, which was in full force and effect at the time this case was decided; and the rules of the Supreme Court do not provide for any exceptions to Rule 33, which rule reads as follows:

> "33. Mandate and Issuance: (1) After the expiration of fifteen (15) days from the filing of an opinion, the Clerk shall issue and transmit a proper mandate to the trial court; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied, the mandate shall not be issued and transmitted until the expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of."

It will be noted that after a petition for rehearing is denied, Rule 33 provides that mandate shall not be issued and transmitted until the expiration of five (5) days from the date of denying petition for rehearing, in order that the losing party may file the second application for a permit to file a petition for rehearing. The words in the above rule are mandatory in character but in this case, when the Supreme Court overruled our petition for rehearing, on November 26, 1946, it ordered that the mandate be issued forthwith. See Page 227, T. R.

The petitioners, thinking that this was an error under the rules, filed a motion to recall mandate, which motion is shown at pages 227-228, T. R., and states that the order overruling the petition for rehearing was not done in open court and while the court was in session on the 26th day of November, 1946, though this was a regular opinion day

of the court which convenes at 9:30 a. m. and adjourns at 12:00 noon. No order was issued while the Supreme Court was in session that day; but an order was sent out sometime in the afternoon by the Chief Justice to the Clerk's office. The Clerk immediately issued the mandate to the trial court, which was filed in the office of the clerk of the trial court before the petitioners knew the court had denied their petition for rehearing. Our petition to recall mandate was denied on December 3, 1946. The order of denial is shown at page 229, T. R., and gives no reason for violating the above rule. After the five (5) days from November 26, 1946, had elapsed, the petitioners, in an effort to preserve the record, filed an application for leave to file a second petition for rehearing on the 19th day of December, 1946, which second petition for rehearing was filed on said date (December 19, 1946). The second petition for rehearing was denied by the Court on said December 19, 1946. See page 240 T. R. In the second petition for rehearing we called the court's attention, for the third time during this trial, that the petitioners had been deprived of their rights under the 14th Amendment to the Constitution of the United States, in violation of the Act of Congress known as Section 303, Title 49, heretofore referred to.

Our Supreme Court of Oklahoma had held that its rules had the force of statutes, even when made to govern inferior courts of the State of Oklahoma; and any judgment entered by any inferior court in violation of such rules, is void. See *Garfield Oil Company* v. *Crews,* 134 Okla. 229, 273 Pac. 228; *Charley* v. *Britton-Johnson Oil Company,* 129 Okla. 153, 263 Pac. 1096; *Cosden Oil and Gas Co.* v. *Hendrickson,* 95 Okla. 206, 221 Pac. 86.

PROPOSITION VI

The decision of the Supreme Court of Oklahoma entered herein violates Section 17, Article 10, of the Constitution of Oklahoma, and the 5th Amendment to the Constitution of the United States.

Respondent admitted in the record that although the land was condemned for park purposes, the principal use to which it was to be dedicated was airport purposes. It was further admitted by respondent that the land was to be leased to commercial airplane companies, common carriers, and to private individuals, thereby lending aid and credit to private enterprise, in violation of Section 17, Article 10, of the Constitution of Oklahoma, which reads as follows:

> "S. 17. Aid to corporations, etc., by counties, cities, towns, etc.—The Legislature shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association, or corporation or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual."

Also, it is in violation of petitioners' rights under the 5th and 14th Amendments to the Constitution of the United States.

The Supreme Court of the United States, in the case of the *Citizens Savings and Loan Association of Cleveland, Ohio* v. *Topeka City*, 22 L. Ed. 455, 87 U. S. 655, in dealing with public moneys to be given or let for private enterprise, held that a statute authorizing a city to issue bonds, the ultimate purpose of which is aid for private enterprise, is void, and that bonds issued under such statutes are void.

So far as the records show in this case, Kansas did not have a constitutional provision at that time such as Section 17, Article 10, of the Constitution of Oklahoma, *supra*. The

court in the above case on Page 461, in passing upon the constitutionality of the legislative act of Kansas, used the following language:

> "To lay, with one hand, the power of government on the property of the citizen, and the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. This is not legislation. It is a decree under legislative forms."

And on Page 462, the Court uses the following language:

> "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.
>
> A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.
>
> In the case of Allen *v.* Inha, of Jay, 60 Me. 124, the town-meeting had voted to loan their credit to the amount of $10,000, to Hutchins & Lane, if they would invest $12,000 in a steam saw mill, grist-mill and box-factory machinery to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds.

The Supreme Judicial Court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special Act of the Legislature had ratified the vote of the town, and they granted the injunction as prayed for.

Shortly after the disastrous fire in Boston, in 1872, which laid an important part of that City in ashes, the Governor of the State convened the legislative body of Massachusetts, called the General Court for the express purpose of affording some relief to the City and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the City to issue its bonds to an amount not exceeding $20,000,000, which bonds were to be loaned, under proper guards for securing the City from loss, to the owners of the ground whose buildings had been destroyed by fire, to aid them in rebuilding.

In the case of Lowell *v.* Boston, in the Supreme Judicial Court of Massachusetts, the validity of this Act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court (111 Mass. 454). The American Law Review for July 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

The same court had previously decided, in the case of Jenkins *v.* Anderson, 103 Mass. 94, that a statute authorizing the town authorities to aid by taxation, a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

The same principle precisely was decided by the State Court of Wisconsin in the case of Curtis *v.* Whipple, 24 Wis. 350. In that case a special statute

which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of Whiting *v.* Fond du Lac, already cited, the principle is fully considered and re-affirmed.

These cases are clearly in point, and they assert a principle which meets our cordial approval."

The Supreme Court of the United States, in the case of *William O. Cole* v. *The City of La Grange,* 28 L. Ed. 896, 113 U. S. 9, deals with taking property for private use, and uses the following language:

"1. The general grant of legislative power in the Constitution of a State does not authorize the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object.

2. The Legislature of Missouri has no constitutional power to authorize a city to issue its bonds by way of donation of a private manufacturing corporation."

And on Page 898, the Court uses the following language under the Constitution of the State of Missouri:

"The express provisions of the Constitution of Missouri tend to the same conclusion. It begins with a Declaration of Rights, the sixteenth article of which declares that 'no private property ought to be taken or applied to public use without just compensation.' This clearly pre-supposes that private property cannot be taken for private use. St. Louis Co. Ct. *v.* Griswold, 58 Mo. 175, 193; 2 Kent. Com., 339 note, 340. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever. It is true that this article regards the right of eminent domain and not the power to tax; for the taking of property by taxa-

tion requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes. But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends.

The only other provisions of the Constitution of Missouri, having any relation to the subject are the following sections of the eleventh article:

'*(Sec. 13)* The credit of the State shall not be given or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the State.'

'*(Sec. 14)* The General Assembly shall not authorize any county, city or town to become a stockholder in or loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.'

Both these sections are restrictive and not enabling. The 13th section peremptorily denies to the State the power of giving or lending its credit to, or becoming a stockholder in, any corporation whatever. The aim of the 14th section is to forbid the Legislature to authorize counties, cities or towns, without the assent of the taxpayers, to become stockholders in or to lend their credit to any corporation, however public its object; State *v.* Curators State University, 57 Mo. 178; not to permit them to be authorized under any circumstances to raise or spend money for private purposes.

It is averred in the answer and admitted by the demurrer, that the LaGrange Iron and Steel Company, to which the bonds were issued, was a private manufacturing company, formed for the purpose of carrying on and operating a rolling mill; and 'was a strictly

private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character.' The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the Topeka case or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the Act of the Legislature of Missouri is unconstitutional, and that the bonds, expressed to be issued in pursuance of that Act, are void upon their face."

Summary

We have shown that the respondent in condemning the petitioners' property, and the judgment approving the same, has deprived the petitioners of their property without due process of law, under the 5th and 14th Amendments to the Constitution of the United States, and under Sections 23 and 24, of Article 2, of the Constitution of Oklahoma, for the following reasons:

First: Respondent admitted in the trial, regardless of the allegations in its petition for condemnation of said property, that it condemned said property for airport purposes, to lease, let, and rent to airplane companies, carrying passengers, freight and mail, also to lease, let, and rent to all private individuals.

Second: If it were properly condemned for common carrier purposes, the respondent could not take the fee under the Constitution of the State of Oklahoma.

Third: If the same was condemned for park purposes, the condemnation proceedings had to be brought in the name of the Park Board, and not in the name of The City of Oklahoma City, which made the condemnation proceedings void for park purposes.

Fourth: We have shown that said judgment as affirmed by the Supreme Court of Oklahoma is void, and being void, no estoppel could be charged against petitioners.

Fifth: We have shown that respondent contracted with the Government to build an airport on petitioners' property, and obtained from $250,000 to $300,000 of Government money, and by its leasing said property for oil purposes, violated said contract, thereby defrauding the Government as well as these petitioners.

Sixth: We have shown that the Supreme Court of Oklahoma made orders violating its own rules to the prejudice of these petitioners, thereby depriving them of their rights under the due process clause of the Constitution of the United States.

Seventh: We have shown that the respondent, in issuing bonds and spending the City and Government money, had but one thing in mind and that was to aid private enterprise, and to go into business with private enterprise, in violation of the 5th Amendment to the Constitution of the United States, and Section 17, Article 10, of the Constitution of Oklahoma.

WHEREFORE, your petitioners pray that a writ of certiorai be issued by this Court to the Supreme Court of the State of Oklahoma, as provided by law and the rules of this Court; and that upon the final determination of this case that the judgment of the trial court, as affirmed by the Supreme Court of Oklahoma, on September 24, 1946, and the order of the Supreme Court of Oklahoma, entered on November 26, 1946, overruling our petition for rehearing, and the order of the Supreme Court of Oklahoma, entered on December 3, 1946, denying our petition to recall the mandate, and the order of the Supreme Court of Oklahoma, entered December 19, 1946, overruling the petitioners' petition for a

second rehearing, be set aside, vacated, and held for naught; and that a judgment be entered reversing said Court, and granting the petitioners judgment as prayed for in the trial court; and as was asked for in the Supreme Court of Oklahoma; declaring these petitioners the owners of the property in this litigation, and especially all of the mineral rights; and for such other relief, either at law or equity, to which they may show themselves entitled.

A. E. PEARSON,
815 Colcord Building,
Oklahoma City, Oklahoma,
V. E. STINCHCOMB,
418 First National Bldg.
Oklahoma City, Oklahoma,
Counsel for Petitioners.

(9456)